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No. 38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

[redacted], et al., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONERS' REPLY TO
RESPONDENT'S OBJECTIONS TO JURISDICTION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 295

GERTRUDE WELCH MORRIS, et. al., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

THE INSURANCE COMPANY IS NOT AN INDISPENSABLE PARTY

The petitioners contend that the sole question for review was whether 28 U.S.C. 2463 conferred jurisdiction in these actions.

Counsel for the respondent tacitly admit that Section 2463 does confer jurisdiction, but they seek to justify the decision of the Court of Appeals on the grounds that "the insurance company is an indispensable party to each of these proceedings." This question was not raised in the District Court. Had it been raised, it would have been a simple matter to bring in the Massachusetts Mutual, if necessary or desirable.

Counsel for the Appellee raised the question in their brief in the Court of Appeals. We did not consider that it merited a reply. The Court rationalized (*dehors the record*) and in its opinion stated as a fact:

> "Following the taxpayer's death, which occurred shortly afterwards, the beneficiaries made demand upon the insurance company. The divorced wife sought the net proceeds of her policy. The others requested the net proceeds of their policies less the cash surrender value at the date of death. *Cf. United States v. Bess*, 1958, 357 U.S. 51. *The company replied that since the levy exceeded the total net proceeds it could make no payment.*" (Italics supplied).

The court concluded:

> "Their legal claim is against the insurance company, but they have not sued it. Their asserted reason is that 'no dispute' exists between them. However, in the company's absence, how is this to be determined?"

The record contradicts the court's apparent rationalization. The complaints show that the amount of insurance in-

volved in the three actions is $130,000.00 plus postmortem adjustments (R. 7a, 11a, 16a). The policy loans ($34,992.95) and the premium loans total $50,754.86 (R. 13a, 18a, 19a) plus a premium loan in an undisclosed amount on the $5,000 policy involved in the first action (R. 8a). The net proceeds, therefore, would be approximately $80,000. The amount of the tax lien filed prior to the policy loans was $55,019.70 (R. 8a). (Other liens in undisclosed amounts were filed in subsequent years.) The total net cash value of the policies at the date of death was only $558.79 (R. 9a, 14a, 18a). Nevertheless, the personal funds of the insurance company, as distinguished from the proceeds of the policies, are not in jeopardy.

What constitutes an indispensable party is defined in *Keegan v. Hubbel Oil and Refining Company*, 155 F. 2d 971, wherein the court said:

> "We are of the opinion that parties are indispensable when their interest in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that their interest would be directly affected by the decree."

Whether or not the insurance company is an indispensable party must be determined from an examination of the facts of the case and the relief sought. *Stafford v. Haskell*, 147 F. Supp. 509. An analysis of the facts will disclose that the interest of the insurance company would not be affected by the decree and that it is not a necessary, much less an indispensable party.

The complaints in these cases disclose:

1. That the plaintiffs are the named beneficiaries in the policies of insurance in question.

2. That the United States recorded a valid tax lien against the insured in his lifetime.

3. That subsequent to the filing of the tax lien, but before the insurance company had actual notice thereof, it made policy loans and premium loans to the extent of substantially the entire cash value of the policies.

4. That the policies matured on the death of the insured.

5. That the insurance company has withheld the entire proceeds of the policies in question pursuant to the notice of the tax lien and levy (R. 9a, 14a, 19a).

6. The relief sought by the petitioner in the first action is to have her interest in the policy, which she obtained pursuant to a decree of divorce, as amended, decreed to be prior in time and superior to the tax lien of the United States (R. 10a).

7. The relief sought by the petitioners in the other two actions is to obtain a judicial determination of the extent of the proceeds of said policies to which the tax lien and levy had attached so that they could pay the same and have the proceeds of the policies discharged from the tax lien and levy (R. 14a, 20a).

The only other pleading filed was the defendant's motion to dismiss directed to the jurisdiction of the court (R. 21a).

This Court, in *U.S. v. Bess*, 357 U.S. 51, held that the cash value of life insurance was an asset of the insured to which

a Federal tax lien would attach. This Court, in the case of *Commissioner* v. *Stern*, 357 U.S. 39, also held that the proceeds of life insurance in excess of the cash value payable to a named beneficiary could not be subjected to the payment of Federal taxes assessed against the insured unless they were subject by state law to the claims of creditors. The statutes of Michigan, where the insured resided, exempt such proceeds except to the extent of transfers made or premiums paid in fraud of creditors.

The petitioners, by virtue of being the named beneficiaries, are entitled, in accordance with the contracts, to the face amount of the policies, less any policy loans, and premium loans made to the insured in his lifetime and less the amount of the proceeds to which the Federal tax lien attached. This latter amount is what is sought to be determined in these actions. Is it the cash value of $558.70, or is it that sum plus the amount of any policy and premium loans made after the tax lien was filed, but before notice of the lien and levy were served on the insurer?

The petitioner in the first action alleges facts which, if proven, will constitute her interest in the policy paramount to the interest of her former husband against whose property the respondent has a tax lien. If her interest was paramount to that of the insured and was prior in time to the tax lien and levy of the United States, then it is, as a matter of law, superior to the lien of the United States. The petitioner Gertrude Morris, and only the petitioner Gertrude Morris, and not the insurance company, has a right to obtain a judicial determination to that effect. The interests of the insurance company will not be affected there-

by. In her case, there can be no question of premiums paid in fraud of creditors for the insured paid the premiums pursuant to the divorce decree entered by the Circuit Court for Wayne County, Michigan, in 1941.

The petitioners in the other two actions are seeking to have the amount due the United States, out of the proceeds of their policies, judicially determined so that they may discharge the lien thereon. Neither the petitioners in these actions nor the insurance company are personally liable to the United States for the payment of the tax assessed against the insured. The insurance company is a mere stakeholder which must pay the United States an amount equal to the extent of the proceeds to which the tax lien and levy attached. It has retained the entire proceeds out of which to pay the same, which is more than ample. After such payment, it will remit the balance to the petitioners. Its interest will not be affected by any decree granting the relief sought.

If the insurance company, after the tax lien was filed against the insured, dissipated the cash value, through policy loans, premium loans, or otherwise, and the proceeds remaining in its hands were insufficient to pay the amount due the United States, then, and only in such event, would it be necessary for the United States to seek a judgment or decree against it. This could be done by a third party claim against the insurance company pursuant to the rules of civil procedure. No such situation exists.

CONCLUSION

There is no merit to the contention of counsel for the respondent that the Court of Appeals was justified in affirming the order of dismissal for lack of an indispensable party. The only issue in these cases was whether or not Section 2463 of Title 28 U.S.C. conferred jurisdiction.

The Court of Appeals was obviously influenced by the lack of the insurance company as a party. However, the Court, relying on the recent decision of this Court in *New Hampshire Fire Ins. Co. v. Scandrett*, 362 U.S. 404, based its decision on the question of jurisdiction under Section 2463, concluding that "The District Court correctly dismissed the complaint".

The decision of the Court of Appeals is erroneous and confusing. It conflicts with the decisions of the Court of Appeals for the Third and Ninth Circuits and with the decision of the Second Circuit in the very recent case of *Bullock v. Latham, Comm. of Int. Rev.* (decided July 20, and not yet reported). The question of jurisdiction is one of considerable importance. Certiorari should therefore be granted.

Counsel's reference (*dehors the record*) to the tax lien foreclosure action recently commenced by the respondent in the District Court at Detroit, Michigan, is impertinent. It discloses an action in Michigan against a resident of Georgia (R. 11a) to foreclose a lien on a fund held in Massachusetts.

Respectfully submitted,

FRANCIS W. McCAFFREY,
Counsel for Petitioners

Dated: Sept. 10, 1962.